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In the Supreme Court of the United States

OCTOBER TERM, 1979

JOSEPH BERNITSKY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the enforcement of regulations under the Federal Coal Mine Health and Safety Act of 1969 is a discretionary function.
2. Whether the court of appeals properly affirmed the district court's judgment on a ground other than that relied upon by the district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A22) is reported at 620 F.2d 948. The opinion of the district court (Pet. App. A23-A27) is reported at 463 F. Supp. 1121.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1980. A petition for rehearing was denied on April 11, 1980 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on July 10, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

Petitioners own and operate an underground coal mine in Schuylkill County, Pennsylvania (Pet. App. A4). The operation of petitioners' mine was, at all relevant times, subject to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq.*, and to the mandatory health and safety regulations promulgated thereunder (see Pet. App. A4 to A5).[1] Specifically, as an underground coal mine, petitioners' mine was subject to the regulations contained in 30 C.F.R. 75.1 *et seq.* 30 C.F.R. 75.1712-6(a) requires an operator of an underground coal mine to provide a sanitary toilet within 500 feet of each working place in the mine. Only those sanitary toilets ap-

[1] The Act has since been amended to become the Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290, effective March 9, 1978.

proved by the Mine Safety and Health Administration may be employed to meet this requirement. 30 C.F.R. 75.1712-6(b).

On July 11, 1973, a federal mine safety inspector conducted an inspection of petitioners' mine. Immediately thereafter, he issued a notice of violation, pursuant to 30 U.S.C. 814(b), based on petitioners' failure to provide an approved sanitary toilet as required by 30 C.F.R. 75.1712-6(a) (Pet. App. A4 to A5). Over the next seven months, at petitioners' request, mine inspectors extended the initial date for compliance three times to enable petitioners to acquire an approved toilet, a $79 item. Finally, on February 13, 1974, the Mining Enforcement and Safety Administration issued a withdrawal order pursuant to 30 U.S.C. 814(b), which barred access to the mine except for the purpose of abating the violation. The mine was still closed when, petitioners allege, portions of it collapsed in April 1974 (Pet. App. A5).

Petitioners have never availed themselves of their rights under the Federal Coal Mine Health and Safety Act to either administrative (30 U.S.C. 815) or judicial (30 U.S.C. 816) review of the enforcement actions taken against them. Instead, petitioners commenced the present action, alleging that the partial collapse of their mine in April 1974 was the result of the enforcement activity, particularly the February 13, 1974 withdrawal order, described above. In a second amended complaint, petitioners claimed damages in excess of $2.5 million (Pet. App. A5).

The government filed a motion to dismiss or in the alternative for summary judgment, on the grounds, *inter alia*, that there was no private right of action under the Federal Coal Mine Health and Safety Act, that there was no liability under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, because

the inspection activities gave rise to no duty in tort owed by the United States to petitioners, and that petitioners' claims were barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a). The district court granted the motion to dismiss, holding that there was no private right of action under the Federal Coal Mine Health and Safety Act and that, since no other federal or Pennsylvania statute or decision suggested liability under the circumstances alleged, petitioners' claim was not actionable under the Federal Tort Claims Act (Pet. App. A23-A27).

The Third Circuit affirmed the decision of the district court on one of the alternative grounds presented to, but not decided by, that court. The court of appeals held that the enforcement activities came within the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), and that therefore petitioners' action was barred (Pet. App. A8 to A21). Since, on that ground, "a grant of summary judgment would have been appropriate" (Pet. App. A22), the court of appeals affirmed the district court's dismissal of petitioners' action.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the views of any other circuit or depart from any prior ruling of this Court. Accordingly, further review is not warranted.

1. Essentially, petitioners' claim is that but for the February 13, 1974 withdrawal order for failure to provide an approved sanitary toilet, the April 1974 mine collapse would have been avoided by the maintenance efforts of petitioners' employees. Aside

from the obvious causation issue,[2] the central question presented is whether the issuance of the withdrawal order constituted an exercise of a discretionary function so as to be within the exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).[3] The court of appeals' conclusion that regulatory enforcement pursuant to Section 104(b) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. 814(b), is

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[2] In view of its summary disposition of this case, the court of appeals did not decide the causation issue (Pet. App. A10). It noted (Pet. App. A5), however, that "for want of a nail, the kingdom was lost."

[3] The only basis for petitioners' contention that the issuance of the withdrawal order and preceding notice of violation was not within the discretionary function exception is their assertion that the toilet that was in the mine when the notice of violation and order of withdrawal were issued had been approved by a federal coal mine inspector prior to the July 11, 1973 notice of violation and was approved again subsequent to the February 13, 1974 withdrawal order. Petitioners argue (Pet. 16), accordingly, that the notice of violation and order of withdrawal were issued "without statutory or regulatory authority because the Coal Mine Act does not authorize the imposition of sanctions against coal mine operators where no violation of the Coal Mine Act in fact exists. Therefore, the discretionary function exception does not apply in the present case."

Petitioners are arguing nothing more than that the mine inspectors erred in finding a violation of the Act and in issuing the concomitant notice of violation and order of withdrawal. The discretionary function exception applies, however, "whether or not the discretion involved be abused." 28 U.S.C. 2680(a). Thus, even if the inspectors had erred in issuing the notice of violation and order of withdrawal, so long as the decision whether to issue them was a discretionary function, abuse of that discretion by the inspectors in making the decision would not remove the decision itself from the discretionary function exception.

within the discretionary function exception is manifestly correct.

a. The decision of the court of appeals follows the reasoning employed and the result reached by this Court in *Dalehite* v. *United States*, 346 U.S. 15 (1953). There, the Court defined the requisite discretion as that of "the executive or the administrator to act according to one's judgment of the best course * * *" (346 U.S. at 34). In *Barton* v. *United States*, 609 F.2d 977, 979 (10th Cir. 1979), the court of appeals summarized the applicable law as follows:

> if a government official in performing his statutory duties must act without reliance upon a fixed or readily ascertainable standard, the decision he makes is discretionary and within the exception of the Tort Claims Act.

Accord, *Coastwise Packet Co.* v. *United States*, 398 F.2d 77, 79 (1st Cir.), cert. denied, 393 U.S. 937 (1968).

In the present case, the court of appeals properly focused its analysis (Pet. App. A14) on "the nature of the judgment which must be made in the decision whether to issue a Withdrawal Order closing a noncomplying coal mine" pursuant to 30 U.S.C. 814(b). The following passage sets out the factors on which the court relied in concluding (Pet. App. A13) that the decision to close the mine involved "precisely that kind of judgment which the discretionary function exception encompasses" (Pet. App. A18):

> It is apparent * * * that the decisions regarding issuance of a notice of violation, extensions of time, and orders of withdrawal must be made by the individual inspectors on the basis of their experience and judgment, and therefore fall within the scope of the discretionary function

> exception. They are "matters involving balancing of policy considerations in advancing the public interest." *Griffin* v. *United States*, 500 F.2d 1059, 1064 (3rd Cir. 1974). Decision making as to investigation and enforcement, particularly when there are different types of enforcement action available, are discretionary judgments. *In re Air Crash Disaster Near Silver Plume, Colorado*, 445 F. Supp. 384, 401-04 (D. Kan. 1977); *see First National Bank in Albuquerque v. United States*, 552 F.2d 370, 375-76 (10th Cir.), *cert. denied*, 434 U.S. 835 (1977). Thus, in making the determination of the course to follow, the [Mining Enforcement and Safety Administration] inspector must use his or her judgment as to the manner in which the statutory authority can best be effectuated, an act which cannot subject the government to tort liability.

The court thus correctly held the duties carried out by the federal mining inspectors herein to be within the discretionary function exception as described by this Court in *Dalehite*, *supra*, and by the court of appeals in *Barton*, *supra*.[4] Moreover, the policy embodied in that exception, which bars tort actions as a means of second guessing the discretionary enforcement decisions of federal officials, is particularly applicable to the present case, in which the challenged decision-

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[4] In a case not involving the Federal Tort Claims Act, the Sixth Circuit remarked that in enacting the Federal Coal Mine Health and Safety Act of 1969 it was Congress's intent "to endow mine safety inspectors with the broadest possible discretion." *United States* v. *Consolidation Coal Company*, 560 F.2d 214, 218 (6th Cir. 1977), vacated and remanded on other grounds, 436 U.S. 942 (1978), adhered to on remand, 579 F.2d 1011 (6th Cir. 1978), cert. denied, 439 U.S. 1069 (1979).

making involves the health and safety of workers in an inherently dangerous occupation.

b. Petitioners' reliance on *Hatahley* v. *United States*, 351 U.S. 173 (1956), and *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), is misplaced. *Hatahley* involved the failure of federal agents to adhere to the procedural requirements of local law when, without notice, they sold or destroyed horses belonging to plaintiffs, eight families of Navajo Indians. This Court held that 28 U.S.C. 2680(a) did not apply because the agents had acted, not with "due care," but rather with a "complete disregard for the property rights" of the plaintiffs and had committed "wrongful trespasses not involving discretion on the part of the agents * * *" (351 U.S. at 181). The withdrawal order at issue in this case, issued after notice of a violation of mandatory health and safety standards and after a lengthy period during which petitioners failed to abate the violation, bears no relationship to the wrongful summary seizure of property in *Hatahley*.

Indian Towing, *supra*, similarly is inapposite. That case involved alleged negligence on the part of the Coast Guard in failing to maintain a lighthouse light or to warn of the light's failure. Although the decision to provide a lighthouse itself was a discretionary function (350 U.S. at 69), the government conceded that the discretionary function exception would not be applicable to the "operational" aspect of maintaining the lighthouse (350 U.S. at 64). Thus, by its decision in *Indian Towing*, this Court merely required the Coast Guard, having undertaken to provide a lighthouse, to exercise due care in its operation (350 U.S. at 69):

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning.

The discretionary functions exercised by federal mine inspectors in deciding whether to issue notices of violations, extensions and withdrawal orders involve a balancing of policy considerations analogous to the decision of whether to provide a lighthouse.

2. The court of appeals properly affirmed the district court on a ground other than that relied on by the district court. As this Court has stated, the "successful party in the District Court may sustain its judgment on any ground that finds support in the record." *Jaffke* v. *Dunham*, 352 U.S. 280, 281 (1957). In basing its affirmance upon the discretionary function exception, which the United States had raised in its motion to dismiss or in the alternative for summary judgment and had briefed on appeal, the court of appeals followed the "settled" rule that "if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937).[5]

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[5] Here, however, we submit that the district court had not erred in holding that the Federal Coal Mine Health and Safety Act did not give rise to a private right of action and that petitioners' claims were not actionable under the Federal

Nor was there any error in treating this matter as one appropriate for summary judgment. The court of appeals considered the affidavits and other submissions which accompanied the government's alternative motion for summary judgment. Since these materials were not contradicted by opposing affidavits and demonstrated that there was no genuine issue as to any material fact, the court of appeals properly proceeded to review the case under the summary judgment standard. *First State Bank of Hudson County* v. *United States*, 599 F.2d 558, 562 (3d Cir. 1979).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Tort Claims Act because the inspection activities did not otherwise give rise to any duty in tort owed by the government to petitioners (Pet. App. A23-A27).

[6] The purported (Pet. 32-41) issues of fact regarding the alleged prior and subsequent approvals of petitioners' toilet are not material to the applicability to this case of the discretionary function exception, which was the basis for the award of summary judgment (see note 3, *supra*).

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